

# INTERNATIONAL TRADE RULES AND INDIGENOUS KNOWLEDGE

## A BASIC INTRODUCTION<sup>1</sup>

by Megan Davis

Indigenous peoples' knowledge relating to the sustainable use of land, ecosystems, plant varieties, medicine, folklore and craft and secret sacred knowledge is often referred to as traditional knowledge or Indigenous peoples' intellectual property. Indigenous peoples refer to this body of knowledge as 'Indigenous knowledge'. The Secretariat of the Permanent Forum on Indigenous Issues has said,

traditional knowledge is developed from experience gained over the centuries and adapted to the local culture and environment, and transmitted orally from generation to generation. It tends to be collectively owned and takes the form of stories, songs, artistic expressions, proverbs, cultural events, beliefs, rituals, community laws, languages, agricultural practices, including the development of plant species and animal breeds, traditional know-how relating to architecture, textile-making and handicraft-making, fishery, health and forestry management.<sup>2</sup>

Over the past twenty years, commercial exploitation of Indigenous knowledge has become particularly aggressive. Global trade and investment in the arts is worth millions of dollars to trans-national corporations ('TNCs') and states yet most Indigenous peoples do not receive the economic benefits of their commercialised knowledge.<sup>3</sup>

This paper provides a conspectus of some of the current concerns about Indigenous knowledge in the context of the World Trade Organization ('WTO').

### I. INDIGENOUS KNOWLEDGE

It is well established that Indigenous knowledge is an anomaly to the Western intellectual property law system and has not been readily accommodated.<sup>4</sup> The WIPO acknowledges that the intellectual property system is in direct conflict with traditional practices and lifestyles:

...traditional knowledge holders are situated between their own customary regimes and the formal intellectual property system administered by governments and inter-governmental

organizations such as WIPO. ... The intellectual property needs of traditional knowledge holders receive their complexity, diversity and relevance from multiple intersections of these factors.<sup>5</sup>

The problematic nature of these systems is also the result of inequalities in bargaining power between Indigenous peoples and the state. These inconsistencies are often overlooked by WTO member states, policy makers and TNCs.

Indigenous peoples feel that the current approaches to traditional knowledge...have not necessarily corresponded to Indigenous views, and that the existing patent and copyrights system of protection does not adequately address their collective rights...<sup>6</sup>

Moreover, many Indigenous peoples argue that Indigenous knowledge, its possession and uses are inherently inimical to the motivations of international trade and intellectual property protections – the acquisition and protection of monetary benefit for intellectual and creative output.

The commodification of traditional knowledge is inherently problematic ... that commercialisation is not always desired and the regulated use of intellectual property rights is regarded as culturally inappropriate.<sup>7</sup>

According to Dr Erica-Irene Daes, former Chairperson Rapporteur of the United Nations ('UN') Working Group on Indigenous Populations in her study on the protection of the cultural and intellectual property of Indigenous peoples,

Indigenous peoples do not view their heritage in terms of property ... but in terms of community and individual responsibility. Possessing a song or medical knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places with which the song, story or medicine is connected.<sup>8</sup>

## II. EXPLOITATION OF INDIGENOUS KNOWLEDGE

Indigenous peoples argue that if Indigenous knowledge is to be exploited for enormous commercial benefit, the profits should be shared by Indigenous communities and the contribution of Indigenous knowledge to advances in science and technology should be acknowledged.<sup>9</sup>

A stark example of such exploitation is evident in the complicity of intellectual property laws advancing biopiracy and theft of Indigenous knowledge. Patent offices in developed countries have granted patents over genetic resources of Indigenous communities without their consent and without economic benefit flowing to the communities. There have been claims of individuals and corporations using over-broad patent claims to appropriate material obtained from genes.<sup>10</sup> There are also concerns relating to cell lines and genes under the Human Genome Diversity Project and bioprospecting of Indigenous peoples' cells continues unabated.<sup>11</sup>

## III. WTO TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY ('TRIPS')

The WTO Trade Related Aspects of Intellectual Property ('TRIPS') Agreement is annexed to the *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* and came into force in 1995.<sup>12</sup> TRIPS seeks the harmonisation of trade related intellectual property rights through standards for the enforcement of these rights such as copyright and patents.

Indigenous peoples have a number of concerns with TRIPS. Of particular concern is Article 8:

Members may...adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

There are concerns regarding the effectiveness of this article and that the TRIPS Agreement could be manipulated to the detriment of the development of *sui generis* intellectual property systems.

Another significant challenge of TRIPS relates to patent protection. According to Caroline Doorman:

Implicit in the TRIPS Agreement's criteria for a patent claim is that there must be an identifiable inventor. This definition

almost immediately dismisses the knowledge systems and innovations of Indigenous peoples and farmers because they innovate communally, over long periods of time. Their innovations are often for the common good and are not intended for industrial application or financial benefit.<sup>13</sup>

Indigenous peoples are also concerned as to how TRIPS directly relates to the success of the implementation of the *Convention on Biological Diversity* ('CBD'). It is unclear as to whether the CBD and TRIPS conflict or are potentially complementary.<sup>14</sup>

The CBD promotes the role of member states as having sovereign rights over the biological diversity within their borders and the authority to determine access to these resources in accordance with national legislation. Moreover, the CBD asserts that access to genetic resources must be obtained with the prior and informed consent of CBD parties and mutually agreed terms.<sup>15</sup> This contrasts with the TRIPS Agreement that promotes technological innovation through the principle of legal certainty and the universalisation of Western intellectual property systems. TRIPS obliges member states to provide product patents for microorganisms and non-biological and microbiological processes whereas the CBD asserts its objective as at the discretion of the state.

The Australian Government has raised its concerns with the TRIPS Council regarding the potential inconsistency between the requirement to access genetic resources under Article 15 of the CBD and the conditions for the grant of a valid patent under Article 27 of TRIPS.<sup>16</sup> In the *Doha WTO Ministerial 2001: Ministerial Declaration*, members of the WTO called for the Council for TRIPS 'to examine... the relationship between the TRIPS Agreement and the Convention on Biological Diversity [and] the protection of traditional knowledge and folklore.'<sup>17</sup>

In the context of Article 8(j) of the CBD, which compels members to 'respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles,' there has also been criticism from Indigenous groups.

It has been noted, for example, that the phrase 'embodying traditional lifestyles' suggests that this provision applies only to 'Indigenous peoples who are isolated, fossilised in some cultural time-warped living in a never changing present', and excludes peoples who have 'adapted their lifestyles to reflect the contemporary and continuing colonial situation in which [they] find [themselves].'<sup>18</sup>

According to Fergus McKay, Article 8 (j) is 'substandard' when compared with the Organization of American States ('OAS') and UN Declarations relating to Indigenous peoples' intellectual property and when the provision is subject to national legislation:

In the first place, it is rendered inoperable, or at least subject to manipulation, in most cases due to the clause 'subject to...national legislation,' as most states' legislation precludes the recognition of Indigenous intellectual property rights. This is even more the case given the emphasis placed upon intellectual property rights in international trade agreements, that protect the expropriator of Indigenous knowledge and culture rather than the Indigenous originators. Second, it only protects Indigenous intellectual property when relevant for 'conservation or sustainable use of biological diversity' and; finally, it merely 'encourages' the sharing of benefits derived from Indigenous knowledge.<sup>19</sup>

## CONCLUSION

More broadly though, in relation to the concerns of Indigenous knowledge, awareness and discussion of the problems relating to the TRIPS Agreement and traditional knowledge, the relationship with CBD and issues with patent laws, has increased. As Bryan Mercurio states,

WTO Member States and interested observers have recognised that significant gaps exist in the agreement with respect to patent protection and access to life-saving medicines in developing and least-developed countries ('LDCs'); but finding and agreeing on improvements to the system has proven to be a much harder proposition.<sup>20</sup>

There are many intellectual property scholars, Gervais and Oguamanam et al, who are emphatic in their argument that TRIPS does not necessarily represent a wholesale negative for Indigenous peoples.<sup>21</sup> Gervais, in particular, has explored a number of ways in which the Western intellectual property system can better protect Indigenous knowledge considering the development of *sui generis* protection, unjust enrichment, misappropriation or geographical indications.<sup>22</sup> Either way, Gervais et al are adamant about the need for the intellectual property system to recognise its inflexibility in relation to non-Western notions of creativity and protection. This is something WTO state parties have been reluctant to acknowledge to date.

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- 1 This paper is an adapted extract from the author's article 'International Trade, the World Trade Organisation and the Human Rights of Indigenous Peoples' (2006) 8 *Balay: Culture, Law and Colonialism*.
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- 14 See generally, J Jones, 'Protecting Indigenous Heritage in the Face of Globalisation' (2004) 6 *Indigenous Law Bulletin* 4, 4.
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**Graphic Design / DTP** John Hewitt

## Published by

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**Printing** Print & Mail Pty Ltd

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**ISSN** 1328-5475

**Citation** (2006) 6(24) *Indigenous Law Bulletin* (or ILB)

*Produced with financial assistance from  
the Australian Government Attorney-General's  
Department*



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<http://mulr.law.unimelb.edu.au/aglcl.asp>

**Word lengths** (including footnotes): 1 page article 600; 2 page article 1200-1300; 3 page article 1800-2000; feature articles (maximum of 4 pages) 2400-2800.

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## EDITORIAL

The first edition of the *Indigenous Law Bulletin* always puts its editors in something of a unique position where we are afforded the opportunity to look upon the significant events at the close of one year while also viewing the unfolding issues and themes of the new. Toward the end of 2006 we witnessed international and local events of enormous significance to Indigenous Australians. In November of 2006 the Third Committee of the United Nations General Assembly elected to defer consideration of the Draft Declaration on the Rights of Indigenous Peoples. It aims to conclude its consideration of the draft declaration by the end of the current session. The shock and disappointment of Indigenous leaders and advocates was summed up in one leader's statement on the importance of the draft declaration, devised and drafted over the past 24 years: it is 'the most important international instrument for the promotion and protection of the human rights of indigenous peoples.'

On a local level, we have seen the debate over 'political intervention' in judicial matters after the death of Mulrunji in police custody on Palm Island in 2004. The issue can be followed broadly through the regular 'Recent Happenings' section of the *Indigenous Law Bulletin* and specifically through an article in this edition by Geraldine Mackenzie, Nigel Stobbs and Mark Thomas. This article looks at the decision by Queensland's Director of Public Prosecutions ('DPP') to not recommend charges against Senior Sergeant Chris Hurley over the death of Mulrunji and examines the role of both the DPP and the Coroner in examining the pertinent issues in this and similar matters. This article was written before the independent review by Sir Laurence Street and the subsequent exercise by the State's Attorney-General of his First Law Officer powers to bring charges of manslaughter and assault.

The first edition for 2007 is kicked off by the Indigenous Law Centre's new Director, Megan Davis. Here Megan outlines her vision for the vibrant future of the Centre while also detailing her own background and goals. The Indigenous Law Centre is thrilled to welcome Megan.

Our November 2006 edition of the *Indigenous Law Bulletin* focusing on young Indigenous people drew a strong response from potential authors – so much so that we publish here another article. Terri Libesman from the University of Technology, Sydney writes about child welfare issues and calls for a new approach to Indigenous child welfare; one which truly recognises the importance